

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Michael Knight,

Complainant,

vs.

Andover Citizens Together ("ACT"),

Respondent.

FINDINGS OF FACT,
CONCLUSIONS, ORDER
AND MEMORANDUM

The above-entitled matter came on for hearing on January 6, 2005, before a panel of three Administrative Law Judges: George A. Beck (presiding judge), Bruce H. Johnson, and Kathleen D. Sheehy. The hearing record closed on January 6, 2005, at the conclusion of the hearing.

Darren Knight, Esq., Knight & Hayano, P.A., 18910 Hamel Road, Plymouth, MN 55446, appeared on behalf of Complainant Michael Knight. John Ward, Chairman, Andover Citizens Together ("ACT"), 15266 Tulip St. NW, Andover, MN 55304-3057, appeared on behalf of Respondent ACT without counsel.

NOTICE

This is the final decision in this case, as provided for by Minn. Stat. § 211B.36, subd. 5. A party aggrieved by this decision may seek judicial review as provided in Minn. Stat. § § 14.63 to 14.69.

STATEMENT OF ISSUES

1. Did ACT violate Minn. Stat. § 211B.06, by making several statements in its mailer and on its website published shortly before November 2, 2004, that it knew were false or that it communicated with reckless disregard of whether they were false?
2. Did ACT violate the disclaimer requirements of Minn. Stat. § 211B.04, by failing to identify the candidates being supported in its mailer and on its website published shortly before November 2, 2004?
3. If so, what remedy, if any, is appropriate?

Based upon the record in this matter, and for the reasons set out in the attached Memorandum, the panel makes the following:

FINDINGS OF FACT

1. Complainant is a member of the City Council of the City of Andover. He has served on the Andover City Council for 20 years and was running for re-election on November 2, 2004. Complainant was re-elected and is currently serving his 6th term as an Andover City Council member.

2. John Erar is the former City Manager of Andover. He was terminated from his employment in April of 2004. Shortly thereafter, Erar filed a lawsuit in U.S. District Court in Minnesota alleging that the City and three of the City Council members (Complainant, Don Jacobson, and Julie Trude) illegally removed him from his position and committed other illegal acts. The City and the three named Council members retained counsel and have filed an answer denying any illegal or wrongful acts.

3. Of the three Council members named in Erar's lawsuit, only Complainant's Council seat was open in the November 2, 2004, election.

4. Among the allegations contained in Erar's lawsuit complaint are the following:

(a) Erar alleges that City Council member Julie Trude demanded that he destroy an email that was sent to her and copied to Andover's mayor, Mike Gamache, Complainant, and Council Member Ken Ortel. The email was from the Chair of the City's Sports Complex Task Force and concerned the City's proposed Community Center project. According to the lawsuit complaint, the email suggested an improper quid pro quo arrangement, offering governmental favors to a major developer in exchange for financial support for a public project.^[1]

(b) Erar alleges that Complainant and Council member Trude pushed for the City to hire OPUS Corporation ("OPUS") as the design and building contractor for the City's proposed Community Center. Erar claims that Trude, in particular, attempted to manipulate the contractor selection process by participating as an "observer" on the panel selected to interview qualified bidders, reviewing submitted proposals, and informing the interview panel that she would be "personally disappointed" if OPUS was not granted an interview. In the end the City's selection committee recommended that a company other than OPUS be hired as the design and building contractor for the Community Center. Both Trude and Complainant argued against the committee's recommendation. According to the lawsuit, Complainant admitted that he had a close friend working at OPUS. The Council voted 3-2 to adopt the committee's recommendation, with Trude and Complainant voting against the recommendation.^[2]

(c) Erar alleges that Complainant and Council members Trude and Don Jacobson voted to eliminate a private developer's required contribution to public road improvements on the City's Clocktower Commons project, resulting in the public's loss of approximately \$300,000 worth of road improvements. According to the lawsuit complaint, the vote of the three Council members was a departure from the City's longstanding practice and

was in direct conflict with the Anoka County Engineer's recommendation to have the developer pay for minimal public improvements.^[3]

5. John Ward is an Andover resident who was concerned about the City Council's handling of the Erar matter and about Erar's lawsuit against the City. Ward and his wife formed ACT for the purpose of informing citizens of Andover about the lawsuit. He and his wife are named as the officers of ACT in documents filed with the Andover City Clerk on October 13, 2004.

The Mailer

6. Ward and other persons associated with ACT designed a mailer that was printed and sent in late October 2004 to all of the approximately 9,000 households in Andover.

7. Complainant received the mailer at his home and became aware of ACT's website on or about October 20, 2004.^[4] The mailer^[5] reads as follows:

THE CITIZENS OF ANDOVER ARE BEING SUED BECAUSE OF THE ACTIONS OF THREE ELECTED OFFICIALS. THE LAWSUIT ALLEGES THAT DON JACOBSON, MIKE KNIGHT AND JULIE TRUDE HAVE COST THE CITY 100's OF THOUSANDS OF DOLLARS ALREADY!

The ex-city administrator, John Erar, has filed a lawsuit against the City of Andover and also has named Council Members Don Jacobson, Mike Knight and Julie Trude. The lawsuit alleges the Council Members Don Jacobson, Mike Knight and Julie Trude violated a number of State and Local Laws that govern the behavior of elected officials and he was terminated for being a whistleblower. Included in the allegations are the following:

The Community Center Project

*Demands to shred public documents to cover up involvement.
Mike Knight and Julie Trude attempted to manipulate bidding process to their favored developer.*

Open Meeting Law Violation

Don Jacobson, Mike Knight and Julie Trude discuss details of City land purchase privately, which is a direct violation of the State of Minnesota open meeting laws.

Clocktower Commons

City of Andover loses a quarter of a million of dollars in road improvements because Don Jacobson, Mike Knight and Julie Trude waive them for a favored developer.

Many other allegations are documented in the legal complaint filed by John Erar's Attorney. Call your Council Member for a copy or visit:
www.Andoverlawsuit.com

These are very serious allegations. You owe it to

yourself to investigate further.

Andover Citizens Together ACT

*Prepared and paid for by the Andover Citizens Together a Political Action Committee, ACT 13266
Tulip St., N.W., Andover 55304*

Andover Citizens Together (ACT) is a group of Andover residents who have been observing the Andover City Council over a period of many months and have been troubled by the actions of some of its members. We present to you information that is based on actions taken, situations, and circumstances that are documented about the government of our City.

The Website

8. On its website, ACT provided further details about the allegations contained in the Erar lawsuit and made statements based upon those allegations, which cast Complainant and the other named Council members in a negative light. The website also posted a copy of Erar's district court lawsuit complaint. Ward and other persons associated with ACT prepared the content of the website.

9. Under the heading "The Community Center," the website listed the allegations contained in the lawsuit regarding Complainant's and Council member Trude's desire to hire OPUS as the contractor for the Community Center project. Following the list of allegations, the website stated in italics: *"This blatant favoritism and the attempts to manipulate do not benefit the City of Andover, but instead ruin the City's reputation."*

10. Under the heading "Clocktower Commons," the website listed the allegations relating to the decision by Complainant and Council members Trude and Jacobson to waive a developer's required contribution to public road improvements. Included in the list of allegations is the statement: "City loses \$300,000." And, following the list of these allegations, the website provides in italics: *The actions of Jacobson, Knight and Trude give the impression that favors can be had in the City of Andover. That is not a good reputation for people thinking about doing business in Our City.*

11. Prior to the election on November 2, 2004, ACT removed from its website the information regarding Erar's lawsuit. Visitors to the website find only a message that reads:

"Thank you to the thousands of concerned residents who visited this website. The goal of ACT is solely to present factual public information that you have a right to know. Again, ACT is not affiliated with any candidate. Please remember to vote on November 2, 2004."

12. On November 1, 2004, Complainant filed a complaint with the Office of Administrative Hearings alleging that ACT's mailer and website contained false statements and violated Minn. Stat. § 211B.06. Specifically, the Complainant alleged that the following statements in the mailer are false because the statements were not, as the mailer claims, contained in Erar's lawsuit: (1) Complainant "cost the City 100's of

thousands of dollars”; (2) “Demands to shred public documents to cover up involvement”; and (3) Complainant “attempted to manipulate bidding process” (on the Community Center Project). Complainant alleged that the following statements on ACT’s website were false: (1) “This blatant favoritism and the attempts to manipulate do not benefit the City of Andover, but instead ruin the City’s reputation”; (2) “City loses \$300,000”; and (3) “The actions of Jacobson, Knight and Trude give the impression that favors can be had in the City of Andover. That is not a good reputation for people thinking about doing business in Our City.” The Complainant also alleged that ACT’s mailer and website failed to have disclaimers in the form required by Minn. Stat. § 211B.04.

13. The mailer and website prominently include the name and address of ACT, but they do not state that they were prepared and paid for by ACT in support of a particular candidate or candidates.

14. ACT spent approximately \$2,200 on creating the website and preparing and distributing the mailer.

Based upon the foregoing Findings of Fact, the panel makes the following:

CONCLUSIONS

1. Minn. Stat. § 211B.35 authorizes the Administrative Law Judge panel to consider this matter.

2. Minn. Stat. § 211B.01, subd. 2, amended in 2004, defines “campaign material” to mean “any literature, publication, or material that is disseminated for the purpose of influencing voting at a primary or other election, ...” The mailer and website at issue in this case are campaign material within the meaning of that statute.

3. Minn. Stat. § 211B.04, as amended in 2004, provides in relevant part as follows:

(a) A person who participates in the preparation or dissemination of campaign material other than as provided in section 211B.05, subdivision 1, that does not prominently include the name and address of the person or committee causing the material to be prepared or disseminated in a disclaimer substantially in the form provided in paragraph (b) or (c) is guilty of a misdemeanor.

(b) Except in cases covered by paragraph (c), the required form of disclaimer is: "Prepared and paid for by the committee,(address)" for material prepared and paid for by a principal campaign committee, or "Prepared and paid for by the committee,(address), in support of(insert name of candidate or ballot question)" for material prepared and paid for by a person or committee other than a principal campaign committee.

4. Minn. Stat. § 211B.06, subd. 1, provides, in part: “A person is guilty of a gross misdemeanor who intentionally participates in the preparation, dissemination ... of ... campaign material with respect to the personal or political character or acts of a candidate ... that is designed or tends to elect, injure, promote, or defeat a candidate for nomination or election to a public office ..., that is false, and that the person knows is false or communicates to others with reckless disregard of whether it is false.”

5. The burden of proving the allegations in the complaint is on the Complainant. The standard of proof of a violation of Minn. Stat. § 211B.06, relating to false campaign material, is clear and convincing evidence.^[6] The standard of proof of a violation of Minn. Stat. § 211B.04, relating to disclaimers, is preponderance of the evidence.^[7]

6. The Complainant has shown by clear and convincing evidence that ACT violated Minn. Stat. § 211B.06, subd. 1, by preparing and disseminating campaign material that contained false statements about the Complainant that ACT knew were false or communicated to others with reckless disregard of whether they were false.

7. The Complainant has shown by a preponderance of the evidence that ACT violated Minn. Stat. § 211B.04, by failing to have the required disclaimer.

8. These Conclusions are reached for the reasons discussed in the Memorandum below, which is incorporated into these Conclusions by reference.

Based upon the record herein, and for the reasons stated in the following Memorandum, the panel of Administrative Law Judges makes the following:

ORDER

IT IS HEREBY ORDERED that ACT pay a civil penalty of \$500 by March 1, 2005, for violating Minn. Stat. §§ 211B.04 and 211B.06.^[8]

Dated this 20th Day January 2005.
 of _____

/s/ George A. Beck
GEORGE A. BECK
Presiding Administrative Law Judge

/s/ Bruce H. Johnson
BRUCE H. JOHNSON
Administrative Law Judge

/s/ Kathleen D. Sheehy
KATHLEEN D. SHEEHY
Administrative Law Judge

MEMORANDUM

Complainant argues that ACT prepared and distributed campaign material that was false and that ACT knew was false or communicated to others with a reckless disregard of whether it was false. Specifically, Complainant claims that several statements in a mailer prepared and distributed by ACT and several statements on ACT's website, which ACT identified as allegations taken from Erar's lawsuit, are false because they are not contained in Erar's complaint.^[9] Instead, Complainant maintains that the statements are inaccurate and misleading interpretations of what is alleged in Erar's lawsuit. ACT concedes that the statements identified by Complainant are not lifted verbatim from the lawsuit, but insists that the statements are a reasonable interpretation or summary of the allegations contained in Erar's lawsuit complaint.

Minnesota Statute § 211B.06, prohibits the dissemination of false campaign material. When interpreting the prohibition against false statements in a predecessor statute, the Minnesota Supreme Court observed that the statute was "directed against the evil of making false statements of fact and not against criticism of a candidate or unfavorable deductions derived from the candidate's conduct."^[10] In that case, *Kennedy v. Voss*,^[11] a candidate used an incumbent's "no" vote on a county budget vote to infer that the incumbent did not support any of the individual items in that budget. In fact, the incumbent did support a number of the individual items, but voted "no" because the budget included an additional \$18,000 appropriation, which the incumbent opposed. The Minnesota Supreme Court held that inferences based on *fact* (in this case, the incumbent's "no" vote) did not come within the purview of the statute even if the inferences are "extreme and illogical." The Court pointed out that the public is protected from such extreme inferences by the candidate's ability to rebut remarks during the campaign process.

In creating its mailer and website, ACT summarized the allegations contained in Erar's lawsuit. Unlike *Kennedy v. Voss*, however, ACT's inferences and unfavorable deductions were not always based on fact. And in some instances, ACT's statements were sufficiently contrary to fact to be violative of Minnesota Statute § 211B.06.

Statements in the Mailer

"Demands to shred public documents to cover up involvement."

The mailer states that Erar's lawsuit includes an allegation that there were "demands to shred public documents to cover up involvement." In paragraphs 9 through 19 of the lawsuit complaint, Erar alleges that Council member Trude demanded that Erar destroy his copy of an email that she and others received suggesting an improper quid pro quo arrangement relating to the City's proposed Community Center Project. According to the lawsuit, Trude believed the email to be private but was concerned that the public might obtain access to it under the Government Data Practices Act.

Although Erar's lawsuit does allege that Trude demanded the email be destroyed, there are no allegations in the lawsuit of demands to "shred public documents to cover up involvement." And there are no such allegations that specifically relate to the Complainant. The statement by ACT implies allegations of far-reaching

and serious illegal conduct on the part of the Council members. That is, it suggests that the lawsuit alleges that one or all three of the Council members named in the mailer were involved in shredding documents to “cover up” some sort of illegal activity associated with the Community Center project. While the lawsuit does allege that the email suggested an improper quid pro quo for financing the Community Center project, it does not allege that any of the Council members were involved in such a quid pro quo. This statement in the mailer is false because, contrary to ACT’s claim, there is no allegation in Erar’s lawsuit of “demands to shred public documents to cover up involvement” and no allegation that the Complainant was involved in such conduct as the mailer suggests. ACT’s statement is too far from the words of the lawsuit complaint to be found to be true. ACT had a copy of Erar’s lawsuit complaint and was aware of the allegations contained therein. Complainant has established by clear and convincing evidence that ACT knew this statement was false or communicated it to others with reckless disregard of whether it was false.

“The lawsuit alleges that Don Jacobson, Mike Knight and Julie Trude have cost the City 100’s of thousands of dollars already!”

The mailer also states that Erar’s lawsuit alleges that Complainant and Council members Jacobson and Trude have cost the City “100’s of thousands of dollars already!” This is not a false statement. Erar’s lawsuit does allege in paragraph 39 of the complaint that Complainant and Council members Trude and Jacobson voted to eliminate a private developer’s required contribution to public road improvements, which resulted in the loss of \$300,000 to the City. Whether this statement is factually true is something that will be decided in District Court. No evidence as to the underlying merits of the statement was offered or admitted. The only issue before this panel is whether the statement in the mailer that the lawsuit alleges that the three Council members have cost the City 100’s of thousands of dollars is a false statement. Because the lawsuit does in fact allege that the actions of the three Council members cost the City \$300,000 in road improvements, the Complainant has failed to show that this statement is false.

“Mike Knight and Julie Trude attempted to manipulate bidding process to their favored developer.”

Finally, the mailer states that Erar’s lawsuit alleges that the Complainant and Council member Trude attempted to manipulate the bidding process to their favored developer. With respect to the Complainant, Erar’s lawsuit alleges that Complainant “repeatedly suggested that the City hire OPUS as the design and building contractor”,^[12] that Complainant argued and voted against the committee’s recommendation to not endorse OPUS,^[13] and that Complainant admitted that he had “a close friend working at OPUS.”^[14] These allegations do not amount to a claim that the Complainant attempted to “manipulate the bidding process” to his favored developer. At most the lawsuit alleges that Complainant lobbied the committee to hire OPUS because a close friend worked there. “Manipulating the bidding process” suggests that Complainant tried to illegally undermine the City’s open bidding process on a City construction project. This was not alleged in Erar’s lawsuit complaint. This statement is false and Complainant has shown by clear and convincing evidence that ACT knew it was false or communicated it to others with reckless disregard of whether it was false.

Statements on the Website

"This blatant favoritism and the attempts to manipulate do not benefit the City of Andover, but instead ruin the City's reputation."

This sentence appears under the heading "The Community Center" and follows a list of the lawsuit's allegations concerning efforts by Complainant and Council member Trude to get the City to hire OPUS for the project. The majority of the allegations listed refer specifically to Trude and concern her alleged disclosure of private data and her attendance at the committee's interviews as an "observer." Other than stating that the Complainant wanted to hire OPUS and had a close friend working for OPUS, none of the allegations listed suggest that Complainant "attempted to manipulate" anything. Therefore, this statement does not clearly refer to acts of the Complainant, which is required in order to establish a violation of section 211B.06. In addition, the sentence is not a false statement. Complainant did blatantly favor OPUS as the contractor for the project and the phrase "attempts to manipulate" is too ambiguous to be false. Unlike the mailer, the website does not state that Complainant attempted to manipulate the bidding process. Third, the statement reads more like an opinion than a statement of fact. For all of these reasons, the panel concludes that Complainant has failed to establish by clear and convincing evidence that ACT violated section 211B.06 by including this sentence on its website.

"City loses \$300,000."

As discussed above, Erar's lawsuit does in fact allege that the actions of the Complainant and Council members Jacobson and Trude in waiving a private developer's required contributions to public road improvements resulted in the City's loss of approximately \$300,000 worth of road improvements. Therefore, Complainant has failed to establish that this statement on the website is false and violated Minn. Stat. § 211B.06.

"The actions of Jacobson, Knight and Trude give the impression that favors can be had in the City of Andover. That is not a good reputation for people thinking about doing business in Our City."

This statement appears on the website under the heading "Clocktower Commons" and refers to the Erar's allegation regarding the decision by Complainant and the other Council members to waive a private developer's road improvement contributions. This statement is simply an opinion rather than a statement of fact and is therefore not false. Complainant has failed to establish by clear and convincing evidence that this statement violated Minn. Stat. § 211B.06.

Disclaimer

For campaign material prepared and paid for by a person or committee other than a principal campaign committee, Minn. Stat. § 211B.04(b) requires disclaimers in the following form: "Prepared and paid for by the _____ committee, _____ (address), in support of _____ (insert name of candidate or ballot question)." ACT's mailer and website are campaign material. Both prominently included the name

and address of ACT, but neither stated that they were prepared and paid for by ACT in support of a certain candidate or candidates in the form required by Minn. Stat. § 211B.04.

Ward testified that ACT did not support any particular candidates. However, Ward conceded that the mailer and website placed Complainant and the other two Council members in a negative light by summarizing the misdeeds alleged in the lawsuit. Of the three Council members identified in Erar's lawsuit and in ACT's campaign material, only Complainant was up for election on November 2, 2004. Given these facts and Mr. Ward's personal support of the candidate running against the Complainant, it appears that his material was prepared to help defeat the Complainant and help his opponent. The panel concludes that ACT did violate Minn. Stat. § 211B.04 by failing to substantially comply with the disclaimer requirements.

Having found that ACT violated Minn. Stat. § 211B.04 and § 211B.06, the panel may make one of several dispositions.^[15] The panel may dismiss the complaint, may issue a reprimand, may impose a civil penalty of up to \$5,000, and may refer the complaint to the appropriate county attorney for criminal prosecution. In this case, the panel has decided to impose a total civil penalty of \$500.

With respect to the false campaign material, the panel views ACT's conduct to be ill-considered but not deliberately deceitful. ACT was careful to identify the statements in its material as allegations in a lawsuit, but it failed in some instances to accurately summarize those allegations. Although the mailing was sent to all households in Andover, neither the mailing nor the website seem to have impacted voters as Complainant won re-election easily. In addition, Complainant was aware of the mailing and website on or about October 20, 2004, which gave him more than a week to respond to the allegations prior to the election. A penalty of \$400 is appropriate for this violation.

As for the violation of Minn. Stat. § 211B.04, even though the mailer and website lacked all of the information required by law, members of the public were clearly not misled about who was responsible for preparing the material. Both the mailer and the website prominently included the name and address of ACT. Only the identity of the particular candidate supported was missing. The Panel concludes that the violation was inadvertent and unintentional and was not a deliberate attempt to mislead the public or circumvent the law. For this violation, the panel finds a civil penalty in the amount of \$100 is appropriate.

G.A.B., B.H.J., K.D.S.

^[1] Ex. 3, ¶¶ 9-19.

^[2] Ex. 3, ¶¶ 21-29.

^[3] Ex. 3, ¶ 39.

^[4] Complaint form; Exs. 1 and 6.

^[5] The mailer is printed in a font size that ranges from approximately 12 to 8 points.

^[6] Minn. Stat. § 211B.32, subd. 4.

^[7] Minn. Stat. § 211B.32, subd. 4.

^[8] The check should be made payable to “Treasurer, State of Minnesota”, and sent to the Office of Administrative Hearings, 100 Washington Avenue South, Suite 1700, Minneapolis, MN 55401.

^[9] The Complainant also at times argued that the statements were false on their merits. But as no evidence as to the factual basis underlying the allegations was offered or admitted, this decision is limited to whether the statements at issue are contained in the lawsuit as claimed.

^[10] Kennedy v. Voss, 304 N.W.2d 299, 300 (Minn. 1981).

^[11] 304 N.W.2d 299 (Minn. 1981).

^[12] Ex. 3, para 27.

^[13] Ex. 3, para. 29.

^[14] Ex. 3, para. 29.

^[15] Minn. Stat. § 211B.35, subd. 2.